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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF ALASKA AT ANCHORAGE**

16 ENOCH ADAMS, JR., LEROY ADAMS,  
17 ANDREW KOENIG, JERRY NORTON  
18 DAVID SWAN and JOSEPH SWAN,  
19 Plaintiffs,  
20 v.  
21 TECK COMINCO ALASKA INCORPORATED  
22 Defendant.  
23

24 NANA REGIONAL CORPORATION and  
25 NORTHWEST ARCTIC BOROUGH,  
26 Intervenor-Defendants.  
27  
28

Case No. A04-49 (JWS)

**PLAINTIFFS' OBJECTIONS  
TO TECK COMINCO'S  
LIABILITY WITNESS LIST  
AND MOTIONS IN LIMINE  
TO EXCLUDE WITNESSES  
AND EVIDENCE THAT IS  
NOT RELEVANT  
(Evidence Code §402)**

PLAINTIFFS' OBJECTIONS TO WITNESS LIST  
AND MOTIONS TO EXCLUDE WITNESSES

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**I. WITNESSES AT THE LIABILITY PHASE OF TRIAL MUST TESTIFY ABOUT ISSUES RELEVANT TO LIABILITY.**

The Clean Water Act is a strict liability statute. 33 U.S.C. § 1311(a); *Hawaii's Thousand Friends v. City and County of Honolulu*, 821 F. Supp. 1368, 1392 (D. Ha. 1993). At issue during the liability phase are the questions, 1) did the alleged violations of Teck Cominco's permit conditions take place? And 2) if so, are they ongoing or capable of repetition? *See Enoch Adams, et al. v. Teck Cominco Alaska, Inc.*, 396 F. Supp.2d 1095, 1099 (D. Ak. 2006). A great majority of the violations have already been admitted by Teck Cominco in its discharge monitoring reports (DMRs) filed with EPA and in its Answer and other pleadings filed in this case; the central issue for monthly TDS, daily cyanide, monthly cyanide, daily whole effluent toxicity (WET) and monthly WET violations is whether the violations are ongoing.

These violations and their ongoing nature will be proven by documentary evidence such as the DMRs filed by Teck Cominco and the Compliance Orders by Consent (COBCs) entered into by Teck Cominco. These documents will, on their face, demonstrate both the violations and their ongoing nature. *See, e.g.*, Exhibit 1 to Declaration of Luke Cole in Support of Motion in Limine to Preclude Testimony ("Cole dec.") (excerpt of October 2007 DMR reporting daily and monthly cyanide violations); Exhibit 2 to Cole dec. (excerpt of 2006 COBC attesting, over Teck Cominco's signature, that, "At times during the months of ... May-June 2004, and May-June 2005, Teck Cominco violated the TDS effluent limits in Part I.A.1 of the 1998 Permit").

Despite the narrow issues at trial – strict liability for those proven violations, and resolution of the question of whether the violations are ongoing or capable of repetition – Teck Cominco presents this Court with a list of 45 witnesses it anticipates calling at trial, the vast majority of them, it discloses, to testify about subjects wholly apart from permit violations and

1 whether or not they are ongoing. Some witnesses are offered to discuss the conditions at  
2 Kivalina, some are Teck Cominco employees apparently prepared to explain why certain  
3 violations happened. Many witnesses are laboratory personnel offered to discuss the results of  
4 their lab tests – lab tests which, by stipulation of the parties, are all already fully admitted and in  
5 no need of authentication. Two U.S. Environmental Protection Agency (“EPA”) staffers are  
6 offered to talk about the COBCs, although the COBCs are not relevant to liability here. Two  
7 witnesses are even offered to give the *State of Alaska’s* “perspective” on this federal suit to  
8 enforce a federal permit under the federal Clean Water Act!  
9

10  
11 This parade of witnesses is not only unnecessary, the vast majority of the testimony  
12 proffered by Teck Cominco through these witnesses is simply not relevant to liability. As  
13 explained below, the conditions at Kivalina are not relevant to Teck Cominco’s liability. The  
14 opinions of state officials are not relevant to Teck Cominco’s liability. The opinions of random  
15 EPA staff are not relevant to Teck Cominco’s liability. The testimony of lab technicians as to the  
16 results of their tests are not relevant, particularly when the lab results themselves are not in  
17 dispute and are their own best evidence. The testimony of Teck Cominco employees explaining  
18 the reasons for non-compliance is not relevant under the strict liability of the Clean Water Act.  
19 And the testimony of Teck Cominco employees as to topics other than Teck Cominco’s permit  
20 violations, and whether or not the are ongoing, is not relevant at the liability phase.  
21

22  
23 Through this set of objections to Teck Cominco’s Liability Phase Witness List and  
24 motions in limine to exclude irrelevant testimony and witnesses, the Adams plaintiffs attempt to  
25 restore some focus to the trial proceedings at the liability phase. The great majority of Teck  
26 Cominco’s proffered witnesses – 33 of the 45 – can be excluded entirely on relevance grounds  
27  
28

1 alone, and the testimony of the remaining witnesses should be strictly limited to issues actually  
2 relevant to liability. Adams respectfully requests, through this motion and others filed  
3 simultaneously with it, that the Court assert its control over the trial process and preclude the  
4 carnival of irrelevance that Teck Cominco apparently envisions and proposes as its portion of  
5 trial's liability phase.  
6

## 7 **II. LEGAL STANDARD**

8  
9 Rule 402 of the Federal Rules of Evidence states, "Evidence which is not relevant is not  
10 admissible." This is the critical benchmark for our inquiry into Teck Cominco's proffered  
11 witnesses and the testimony Teck Cominco describes they will be giving in this Clean Water Act  
12 enforcement suit at the liability phase.  
13

14 The Clean Water Act was designed to lend itself to speedy and simple enforcement. It is  
15 a strict liability statute: to establish a violation of the Act, a plaintiff need only prove that the  
16 defendant violated the terms and conditions of its NPDES permit. *See* 33 U.S.C. § 1311(a),  
17 1342(k); *see also Hawaii's Thousand Friends v. Honolulu*, 821 F. Supp. 1368, 1392 (D.Haw.  
18 1993) ("Courts throughout the country have held that NPDES compliance is a matter of strict  
19 liability and a defendant's intent and good faith are irrelevant"); *Sierra Club v. Union Oil Co. of*  
20 *Cal.*, 813 F.2d 1480, 1490-1491 (9th Cir. 1988), *vacated for reconsideration*, 485 U.S. 931  
21 (1988), *reinstated & amended*, 853 F.2d 667 (9th Cir. 1988) ("*Sierra Club*") (whether violations  
22 are de minimis, "technical," "rare" or insignificant is irrelevant to liability); *Mumford Cove Ass'n*  
23 *v. Town of Groton*, 640 F. Supp. 392, 395 (D.Conn. 1986) (fault, intent and environmental harm  
24 are relevant only with respect to remedies).  
25  
26  
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**III. THE CONDITIONS AT KIVALINA ARE NOT RELEVANT TO TECK COMINCO'S LIABILITY.**

The conditions at Kivalina and elsewhere in the Wulik River watershed are not at issue in the liability phase.<sup>1</sup> Nor are NANA's actions. Thus, as explained more fully below, Adams respectfully objects to the testimony of and moves in limine to preclude the following listed witnesses from testifying at the liability phase at trial: Roland Booth, Bert Adams, Sr., Theodore Booth, Alvin G. Ott and Joyce Tsuji.

**A. The testimony of Roland Booth is not relevant.**

Teck Cominco lists Mr. Booth on its witness list with the following description:

Roland Booth is a resident of Noatak. He is expected to testify regarding his observations of the availability, location, quantity and quality of subsistence resources over the years near and around Kivalina. He is also expected to testify regarding his observations on issues related to the drinking water in Kivalina. Mr. Booth is expected to testify regarding his knowledge of NANA's work to preserve the region's subsistence resources and his work with the Red Dog Mine subsistence committee.

Liability Phase Witness List at 2. None of the proffered subjects – subsistence resources and drinking water at Kivalina, and NANA's work – are in any way relevant to the issues to be proven at the liability phase, violations of Teck Cominco's permit and whether or not they are ongoing. Accordingly, Mr. Booth should be precluded from testifying.

**B. The testimony of Bert Adams, Sr. and Theodore Booth is not relevant.**

---

<sup>1</sup>To the extent that the conditions at Kivalina are relevant at all in this litigation, it would be to decide the threshold issue of standing. That threshold has been crossed. As the Court ruled in this case, "plaintiffs have satisfied Article III's requirements and have standing to bring this action." Order and Opinion, Docket 136 at 8. Thus, such testimony is not relevant, period.

Furthermore, even if standing were at issue (which it is not), the testimony of non-parties such as Mssrs. Booth, Mr. Bert Adams, Dr. Ott and Ms. Tsuji would not be relevant to the experiences and perceptions of the individual plaintiffs. Standing is determined by the injury in fact to a litigant, not the perceptions of a non-party.

1 Teck Cominco describes Mr. Adams's and Mr. Theodore Booth's testimony in identical  
2 language to two of the sentences used to describe Roland Booth's testimony:

3 He is expected to testify regarding his observations of the availability, location, quantity  
4 and quality of subsistence resources over the years near and around Kivalina. He is also  
5 expected to testify regarding his observations on issues related to the drinking water in  
6 Kivalina.

7 Liability Phase Witness List at 2. Neither of the proffered subjects – subsistence resources and  
8 drinking water at Kivalina – are relevant to the issues to be proven at the liability phase.

9 Accordingly, Mr. Adams and Mr. Booth should be precluded from testifying.

10 **C. The testimony of Alvin G. Ott is not relevant.**

11 Teck Cominco offers Dr. Ott with the following description:

12 Dr. Ott is with the Office of Habitat Management and Permitting in the Department of  
13 Natural Resources for the State of Alaska. Dr. Ott is an expert in aquatic life in  
14 Northwest Alaska, having conducted a number of studies of the subject in and about the  
15 Red Dog Mine. Dr. Ott will testify to his work designing, implementing and supervising  
16 a bio-assessment program in the waters downstream from Red Dog Mine, the effects of  
17 natural mineralization on aquatic life, the lack of significant effects caused by the mine,  
18 and will otherwise testify consistent with his declarations in this case and the case of  
KRPC v. Teck Cominco, A:02-231 CV (JWS), as well as studies he has authored relative  
to aquatic life in the DeLong Mountain Region.

19 Liability Phase Witness List at 2-3. As with Msrs. Booth and Mr. Adams, above, none of the  
20 proffered testimony is relevant to the liability phase, which is focused solely on violations of  
21 Teck Cominco's permit and whether or not they are ongoing and capable of repetition.

22 Accordingly, Dr. Ott should be precluded from testifying.

23 **D. The testimony of Joyce Tsuji is not relevant.**

24 Teck Cominco offers Ms. Tsuji with the following brief and non-specific description: "A  
25 retained expert. Will testify consistent with her report and supplemental report, and work  
26 performed by Exponent for Red Dog Mine." Liability Phase Witness List at 3. Although not  
27  
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revealed by this description, Ms. Tsuji's "report and supplemental report" both discuss human health and drinking water in the Wulik River. Cole dec. ¶4. As discussed above, such testimony is simply not relevant to the liability phase, which is focused solely on violations of Teck Cominco's permit and whether or not they are ongoing and capable of repetition. Further, not one of the 802 exhibits offered by Teck Cominco, or the 52 joint exhibits lodged by the parties, are authored by Exponent. Cole dec. ¶5. There is nothing to work from to uncover the relevance of "work performed by Exponent for Red Dog Mine," and nothing in Tsuji's reports about violations or their ongoing nature. Accordingly, Ms. Tsuji should be precluded from testifying. (Plaintiffs are separately moving to preclude Ms. Tsuji's testimony because of Teck Cominco's failure to disclose her testimony with the requisite specificity.)

**IV. THE OPINIONS OF STATE ENVIRONMENTAL OFFICIALS ARE NOT RELEVANT TO LIABILITY UNDER THE FEDERAL CLEAN WATER ACT AND TECK COMINCO'S FEDERAL PERMIT.**

This case is brought under the federal Clean Water Act and concerns only violations of federal permits issued by the U.S. EPA. The meaning of a NPDES permit is a question of law for the court to decide. See *California Public Interest Research Group v. Shell Oil Co.*, 840 F. Supp. 712, 716 (N.D. Cal. 1993) ("*Shell Oil*"). "In construing NPDES permits, courts often defer to the agency *that drafted the permit*, consistent with established rules of statutory construction that give deference to agency interpretations where they are reasonable." *Id.* (emphasis added). The NPDES permits in question here were drafted by the federal EPA, not by the state of Alaska. The opinions of state officials are thus not relevant to liability here, and, as more fully explained below, Adams objects to and moves in limine to preclude the testimony of Nancy Sonafrank and Sharmon Stambaugh.

**A. The testimony of Nancy Sonafrank is not relevant.**

Teck Cominco lists Nancy Sonafrank as a witness, with the following description:

The Section Manager for Water Quality Standards within the AK Department of Environmental Conservation, Ms. Sonafrank will testify as to relevant water quality standards and aquatic life criteria, including cyanide, and the use of the WAD testing method.

Liability Phase Witness List at 6. In this case, Adams has alleged violations of Teck Cominco's effluent limitations (that is, end-of-pipe permit limits) for Total Cyanide. Supplemental Complaint, Docket 174 at ¶¶79-85. There are no allegations of violations of water quality standards or aquatic life criteria, nor any allegations of violations of WAD cyanide tests. Thus, any testimony "as to relevant water quality standards and aquatic life criteria, including cyanide, and the use of the WAD testing method," is not relevant – none of it addresses the violations of the effluent limitations for *Total Cyanide*, which are at issue here. Further, the opinions of a state official on the contents or requirements of a federal permit are likewise not relevant: the permit speaks for itself, and any interpretation of the permit conditions is solely the province of this Court, not an official from a state agency. Thus, no testimony that Ms. Sonafrank is described as giving would be relevant, and Adams moves to preclude the testimony of Nancy Sonafrank.

**B. The testimony of Sharmon Stambaugh is not relevant.**

Teck Cominco states that Sharmon Stambaugh "Will testify as to the compliance and monitoring of Red Dog wastewater discharges from the perspective of the AK Dept. Of Environmental Conservation." Liability Phase Witness List at 6. As with Ms. Sonafrank, the opinions of a state official, her "perspective" on the contents or requirements of a federal permit and Teck Cominco's compliance with it, are simply not relevant: the permit speaks for itself, and any interpretation of the permit conditions is solely the province of this Court, not an official

1 from a state agency. Teck Cominco's compliance with the permit is at issue at trial, but Ms.  
 2 Stambaugh's opinions on that compliance are simply not relevant to Teck Cominco's liability  
 3 under the federal Clean Water Act. Thus, no testimony that Ms. Stambaugh is described as  
 4 giving would be relevant, and Adams moves to preclude the testimony of Sharmon Stambaugh.  
 5

6 **V. EXCUSES AND EXPLANATIONS OF WHY TECK COMINCO FAILED TO**  
 7 **COMPLY ARE NOT RELEVANT UNDER THE STRICT LIABILITY REGIME**  
 8 **OF THE CLEAN WATER ACT.**

9 Again, the Clean Water Act is a strict liability Act. *Hawaii's Thousand Friends v. City*  
 10 *and County of Honolulu*, 821 F. Supp. 1368, 1392 (D. Ha. 1993). As such, even if Teck  
 11 Cominco's violations had been "de minimis" or "rare" and faultless – which they are not – Teck  
 12 Cominco would still be liable for those violations. Courts throughout the country have held that  
 13 NPDES compliance is a matter of strict liability, and a defendant's intent and good faith are  
 14 irrelevant to the liability issue. *Id.* (citing *Stoddard v. Western Carolina Regional Sewer*  
 15 *Authority*, 784 F.2d 1200, 1208 (4th Cir.1986) and *Atlantic States Legal Foundation v. Tyson*  
 16 *Foods*, 897 F.2d 1128, 1142 (11th Cir.1990)). Under the Clean Water Act, fault only becomes  
 17 relevant at the penalty phase.  
 18  
 19

20 Based on information provided by Teck Cominco about the testimony it expects to elicit  
 21 from witnesses for trial, it appears that many of the witnesses are offered in an attempt to  
 22 minimize the significance of the Clean Water Act's requirements. This message is  
 23 fundamentally contrary to the spirit of the Clean Water Act. The Act strikes a delicate balance  
 24 between the environment and commercial and other human interests. It recognizes that very  
 25 serious environmental harms can often be very difficult to perceive; hence its prohibition against  
 26 the discharge of pollutants except as authorized by a NPDES permit. 33 U.S.C. §§ 1311(a), 1342;  
 27  
 28

1 *Sierra Club*, 813 F. 2d at 1483.

2 Teck Cominco offers a series of witnesses in what appears to be an attempt to explain its  
 3 noncompliance. Good faith and substantial compliance are irrelevant as defenses at the liability  
 4 phase of a Clean Water Act case such as this one. *Shell Oil*, 840 F. Supp. at 714 (“[Because the  
 5 CWA imposes strict liability for any violation of a NPDES permit], neither good faith,  
 6 impossibility, nor reporting errors, are accepted as valid defenses to liability”); *Sierra Club*, 813  
 7 F.2d at 1491 (rejecting the substantial compliance defense). Testimony in this vein is irrelevant  
 8 and should therefore be precluded at this stage of litigation, and, as more fully explained below,  
 9 Adams objects to and moves in limine to preclude the testimony of Wayne Hall, Chuck  
 10 Hingsbergen, John Key, Ed Koon, Jackie Lundberg, Keith Malone, John Martinisko, Robert  
 11 Napier and Mike Schierman.

12 **A. The testimony of Wayne Hall is not relevant.**

13 Teck Cominco discloses that “Mr. Hall will testify as to facts involving alleged  
 14 excursions with which he was involved, policies and procedures at Red Dog, permitting history  
 15 and compliance.” Liability Phase Witness List at 5. Here, however, Teck Cominco’s liability  
 16 will be established by its admissions to the EPA through its DMRs. Mr. Hall’s explanations of  
 17 the “alleged excursions” have no bearing on the strict liability Teck Cominco faces – any reasons  
 18 or explanations for the violations are simply not relevant. *Shell Oil*, 840 F. Supp. at 714. Even  
 19 further from relevance at the liability stage are “policies and procedures at Red Dog, permitting  
 20 history and compliance.” Thus, no testimony that Mr. Hall is described as giving would be  
 21 relevant, and Adams moves to preclude the testimony of Wayne Hall.

22 **B. The testimony of Chuck Hingsbergen is not relevant.**

1 Teck Cominco discloses that “Mr. Hingsbergen will testify as to total suspended solids  
2 and issues involving the DMTS port.” Liability Phase Witness List at 5. This Court has already  
3 decided, at the summary judgment stage, the sole total suspended solids violation at the Port  
4 alleged in the Complaint: “As defendant admitted both the TSS violation and the fact that it is  
5 ongoing, plaintiffs’ motion for summary judgment is granted as to the port site TSS violation in  
6 May 2002.” Docket 136. Thus, Mr. Hingsbergen’s testimony on total suspended solids cannot  
7 be relevant. As to any remaining violations at the Port Site, Teck Cominco’s liability will be  
8 established by its admissions to the EPA through its DMRs. Mr. Hingsbergen’s explanations of  
9 “issues involving the DMTS port” have no bearing on the strict liability Teck Cominco faces.  
10 *Shell Oil*, 840 F. Supp. at 714. Thus, no testimony that Mr. Hingsbergen is described as giving  
11 would be relevant, and Adams moves to preclude the testimony of Chuck Hingsbergen.  
12  
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14

15 **C. The testimony of John Key is not relevant.**

16 Teck Cominco discloses that “Mr. Key will testify as to the feasibility of various  
17 treatment options for water at Red Dog.” Liability Phase Witness List at 5. The “feasability of  
18 various treatment options” is, in the words of the *Shell Oil* court, “simply beside the point for  
19 purposes of determining liability.” 840 F.Supp. at 718. Thus, no testimony that Mr. Key is  
20 described as giving would be relevant, and Adams moves to preclude the testimony of John Key.  
21  
22

23 **D. The testimony of Ed Koon is not relevant.**

24 Teck Cominco discloses that Mr. Koon will “offer factual testimony relative to each of  
25 the claimed violations occurring at the DMTS port.” Liability Phase Witness List at 5.  
26 However, Teck Cominco’s liability will be established by its admissions to the EPA through its  
27 DMRs. Mr. Koon’s explanations have no bearing on the strict liability Teck Cominco faces at  
28

1 this phase of the trial. *Shell Oil*, 840 F. Supp. at 714. Thus, no testimony that Mr. Koon is  
 2 described as giving would be relevant, and Adams moves to preclude the testimony of Ed Koon.

3  
 4 **E. The testimony of Jackie Lundberg is not relevant.**

5 Teck Cominco discloses that “Ms. Lundberg will testify as to TIE/TRE and alleged port  
 6 excursions.” Liability Phase Witness List at 6. Although not disclosed by this abbreviated  
 7 description, “TIE/TRE” refers to Toxicity Identification Evaluation/Toxicity Reduction  
 8 Evaluation, which is a step required by Teck Cominco’s permits after a repeated violation of its  
 9 WET test permit limitations. Cole dec. ¶6. Because the TIE/TRE only happens after a violation,  
 10 it is not relevant to proving the violation itself. Further, Ms. Lundberg’s explanation of “alleged  
 11 port excursions” have no bearing on the strict liability Teck Cominco faces on those violations as  
 12 proven by its admissions to the EPA through its DMRs. *Shell Oil*, 840 F. Supp. at 714. Thus, no  
 13 testimony that Ms. Lundberg is described as giving would be relevant, and Adams moves to  
 14 preclude the testimony of Jackie Lundberg. (Plaintiffs are separately moving to preclude Ms.  
 15 Lundberg’s testimony because of Teck Cominco’s failure to disclose her testimony with the  
 16 requisite specificity.)

17  
 18  
 19  
 20 **F. The testimony of Keith Malone is not relevant.**

21 Teck Cominco discloses that Mr. Malone “will testify as to alleged excursions with which  
 22 he was involved, standard operating procedures, and cadmium in Red Dog water.” Liability  
 23 Phase Witness List at 6. Teck Cominco’s liability will be established by its admissions to the  
 24 EPA through its DMRs. Mr. Malone’s explanations of his involvement in the violations, or of  
 25 “standard operating procedures,” or even of cadmium “in Red Dog water” – whatever that may  
 26 be – have no bearing on the strict liability Teck Cominco faces. *Shell Oil*, 840 F. Supp. at 714.



1 Thus, no testimony that Mr. Malone is described as giving would be relevant, and Adams moves  
2 to preclude the testimony of Keith Malone.

3  
4 **G. The testimony of John Martinisko is not relevant.**

5 Teck Cominco discloses that “Mr. Martinisko will testify as to hold times, sampling,  
6 monitoring, and alleged excursions with which he was involved.” Liability Phase Witness List at  
7 6. Teck Cominco’s liability will be established by its admissions to the EPA through its DMRs.  
8 Mr. Martinisko’s explanations have no bearing on the strict liability Teck Cominco faces. *Shell*  
9 *Oil*, 840 F. Supp. at 714. Thus, no testimony that Mr. Martinisko is described as giving would be  
10 relevant, and Adams moves to preclude the testimony of John Martinisko.

11  
12 **H. The testimony of Robert Napier is not relevant.**

13 Teck Cominco discloses that Mr. Napier “will testify as to factual events occurring with  
14 respect to alleged exceedances in 2007.” Liability Phase Witness List at 6. Teck Cominco’s  
15 liability will be established by its admissions to the EPA through its DMRs, however. Mr.  
16 Napier’s explanations of “factual events” have no bearing on the strict liability Teck Cominco  
17 faces. *Shell Oil*, 840 F. Supp. at 714. Thus, no testimony that Mr. Napier is described as giving  
18 would be relevant, and Adams moves to preclude the testimony of Robert Napier.

19  
20  
21 **I. The testimony of Mike Schierman is not relevant.**

22 Teck Cominco discloses that Mike Schierman “Will testify as to weather conditions at  
23 Red Dog as they pertain to claims, and their effects on monitoring, sampling, and transport of lab  
24 samples and results.” Liability Phase Witness List at 6. As noted above, the Clean Water Act is  
25 a strict liability statute, and thus “weather conditions” – presumably to be discussed in the  
26 context of explaining Teck Cominco’s failure to comply with its permit conditions, though not  
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28

1 clear from the description offered by Teck Cominco – are simply not relevant to Teck Cominco’s  
2 liability, to its permit violations, or to the question of whether or not those violations are  
3 ongoing. *Shell Oil*, 840 F. Supp. at 714. Thus, no testimony that Mr. Schierman is described as  
4 giving would be relevant, and Adams moves to preclude the testimony of Mike Schierman.  
5 (Adams is separately moving to preclude the testimony of Mr. Schierman because of Teck  
6 Cominco’s failure to disclose his testimony with the requisite specificity.)  
7

8  
9 **VI. EXPLANATIONS OF LAB TESTS AND METHODOLOGIES ARE NOT RELEVANT.**

10 Defendants may not impeach their own DMRs. *See, e.g., Sierra Club*, 813 F.2d at  
11 1491-92; *United States v. CPS Chem. Co.*, 779 F. Supp. 437, 442 (D. Ark. 1991) (“[f]or  
12 enforcement purposes, a permittee’s DMRs constitute admissions regarding the levels of effluents  
13 that the permittee has discharged” (citation omitted)); *Save Our Bays and Beaches v. City and*  
14 *County of Honolulu*, 904 F. Supp. 1098, 1138 (D. Haw. 1994) (city’s noncompliance reports  
15 which it submitted pursuant to the CWA “constitute admissions of noncompliance which bind  
16 the defendant in this [enforcement] proceeding.”).

17  
18 Liability in this case is governed by what Teck Cominco discharged, and what it reported  
19 to EPA that it discharged. The Ninth Circuit has held that DMRs are “conclusive evidence of an  
20 exceedance of a permit limitation.” *Sierra Club*, 813 F.2d at 1492. The DMRs, in some cases  
21 supported by the documentary lab results, are the best evidence as to what Teck Cominco  
22 discharged and reported to EPA. “[I]t is reasonable to preclude a permittee from impeaching its  
23 own DMRs during an enforcement action proceeding because the ‘NPDES program  
24 fundamentally relies on self-monitoring,’ and ‘allowing permittees to excuse their reported  
25 exceedances by showing sampling error would create the perverse result of rewarding permittees  
26  
27  
28

1 for sloppy laboratory practices.” *Environmental Protection Information Center v. Pacific*  
2 *Lumber Company*, 430 F.Supp.2d 996, 1010 (“*EPIC*”), quoting *Sierra Club*, 813 F.2d at 1492;  
3 see also *Public Interest Research Group*, 361 F. Supp. 2d 1232, 1240-41.  
4

5 Teck Cominco lists a variety of witnesses who are apparently staffers at different  
6 laboratories. Any testimony by these staffers is simply not relevant under the caselaw in the  
7 Ninth Circuit. The lab results which were timely disclosed to the Adams plaintiffs from ACZ  
8 Lab, North Creek Analytical, ENSR, EVS Environmental Consultants, CH2M Hill, and  
9 Parametrix are all admitted in this case for both the liability and penalty phases, and thus there is  
10 no need for authentication or appearance by personnel from these labs. Further, there are  
11 personnel from other environmental consultant agencies listed although no exhibits or any other  
12 disclosures in the exhibits list mention them; these unmentioned consultants are Richard Brown  
13 of American Meteorburst Corp. and Greg Horner of Ecology and Environment.  
14  
15

16 Thus, as explained more fully below, Adams respectfully objects to the testimony of and  
17 moves in limine to preclude the following listed witnesses from testifying at the liability phase at  
18 trial: Sue Barkey, Richard Brown, Stan Capps, Peter Chapman, David DeForest, James Dryden,  
19 Steven Eide, Greg Horner, Kevin Lackey, Kent Patton, David Pillard, Mike Prieve, Mike  
20 Stanoway, William Stubblefield, and Jason Weakley. (In the alternative, if this Court finds that  
21 any of their testimony is relevant – which it is not – then the testimony should be excluded as  
22 redundant as the lab reports are already in evidence.)  
23  
24

25 **A. The testimony of Sue Barkey is not relevant.**

26 Teck Cominco offers Sue Barkey with the following description: “An employee of ACZ  
27 Lab, Ms. Barkey will testify as to effluent analysis, inorganic compounds and cyanide, and will  
28

1 discuss lab protocols *[sic]* and ACZ lab results.” Liability Phase Witness List at 3. As noted  
2 above, once Teck Cominco has submitted its DMRs to the EPA, the lab protocols are not  
3 relevant under the strict liability regime of the Clean Water Act. *EPIC*, 430 F.Supp.2d at 1010.  
4 Neither is explanation of the “effluent analysis, inorganic compounds and cyanide” as the ACZ  
5 lab results speak for themselves and are the best evidence. Thus, no testimony that Ms. Barkey is  
6 described as giving would be relevant, and Adams moves to preclude the testimony of Sue  
7 Barkey.  
8  
9

10 **B. The testimony of Richard Brown is not relevant.**

11 Teck Cominco offers Richard Brown with the following description: “An employee of  
12 American Meteorburst Corp., Mr. Brown will testify as to auto-monitoring equipment and in-  
13 stream conductivity.” Liability Phase Witness List at 3. Adams is unable to find any exhibits  
14 among the 802 offered by Teck Cominco and the further 52 joint exhibits filed by the parties that  
15 are authored by (or indeed that even refer to) American Meteorburst Corp. Cole dec. ¶5.  
16 Further, none of the violations Adams will prove at trial – of TDS, cyanide and WET effluent  
17 limitations – involve auto-monitoring equipment or in-stream conductivity. Thus, no testimony  
18 that Mr. Brown is described as giving would be relevant, and Adams moves to preclude the  
19 testimony of Richard Brown.  
20  
21

22 **C. The testimony of Stan Capps is not relevant.**

23 Teck Cominco discloses that “An employee of ENSR, Mr. Capps will testify as to WET  
24 testing methodology, laboratory procedures, and results.” Liability Phase Witness List at 3.  
25 Once Teck Cominco has submitted its DMRs to the EPA, WET testing methodology and  
26 laboratory procedures are not relevant because of the Clean Water Act’s strict liability. *EPIC*,  
27  
28

1 430 F.Supp.2d at 1010. Further, any WET test results by ENSR speak for themselves, and are  
2 already admitted as evidence. Thus, no testimony that Mr. Capps is described as giving would be  
3 relevant, and Adams moves to preclude the testimony of Stan Capps.  
4

5 **D. The testimony of Peter Chapman is not relevant.**

6 Teck Cominco discloses that “An employee of EVS Environmental Consultants, Dr.  
7 Chapman will testify as to toxicology, TDS, WET and the effect of mine effluent on fish and  
8 other aquatic life.” Liability Phase Witness List at 3. EVS conducted several WET tests used in  
9 the DMRs, but such test results are themselves the best evidence. At the liability phase, there is  
10 no place for testimony about “toxicology” nor about “the effect of mine effluent on fish and other  
11 aquatic life.” Thus, no testimony that Dr. Chapman is described as giving would be relevant, and  
12 Adams moves to preclude the testimony of Peter Chapman.  
13  
14

15 **E. The testimony of David DeForest is not relevant.**

16 Teck Cominco discloses that “Mr. DeForest will testify as to the analytical history of  
17 WET testing, and laboratory caused apparent excursions of WET parameters.” Liability Phase  
18 Witness List at 4. Under the Clean Water Act, the “analytical history of WET testing” and the  
19 “laboratory caused apparent excursions of WET parameters” are simply not relevant to liability.  
20 See *Shell Oil*, 840 F. Supp. at 714; *EPIC*, 430 F.Supp.2d at 1010. Thus, no testimony that Mr.  
21 DeForest is described as giving would be relevant, and Adams moves to preclude the testimony  
22 of David DeForest.  
23  
24

25 **F. The testimony of James Dryden is not relevant.**

26 Teck Cominco discloses that “A principal of Dryden Instruments, he will testify as to  
27 field monitoring equipment used for NPDES monitoring and his consulting work in regard  
28

1 thereto. He will testify to the conscientious nature of Teck Cominco's commitment to meeting  
2 its obligations for monitoring." Liability Phase Witness List at 4-5. None of the violations  
3 Adams will prove at trial – the TDS, cyanide and WET violations – involve "field monitoring  
4 equipment" as all are effluent (end of pipe) limitations. Further, "the conscientious nature of  
5 Teck Cominco's commitment to meeting its obligations for monitoring" is wholly irrelevant as  
6 the Clean Water Act is a strict liability statute. See *Shell Oil*, 840 F. Supp. at 714. Thus, no  
7 testimony that Mr. Dryden is described as giving would be relevant, and Adams moves to  
8 preclude the testimony of James Dryden.  
9

11 **G. The testimony of Steven Eide is not relevant.**

12 Teck Cominco discloses that "Mr. Eide, of CT&E Environmental Services, Inc., will  
13 testify as to test protocols, issues involving the laboratory receiving station, inorganics, and hold  
14 time logistics." Liability Phase Witness List at 5. Because the Clean Water Act is a strict  
15 liability statute, none of these issues – test protocols, the laboratory receiving station, inorganics  
16 and hold time logistics – are relevant to issues of liability. *EPIC*, 430 F.Supp.2d at 1010. Thus,  
17 no testimony that Mr. Eide is described as giving would be relevant, and Adams moves to  
18 preclude the testimony of Steven Eide.  
19

21 **H. The testimony of Greg Horner is not relevant.**

22 Teck Cominco discloses that "Mr. Horner will testify as to studies performed by Ecology  
23 and Environment." Liability Phase Witness List at 5. Adams is unable to find any exhibits  
24 among the 802 offered by Teck Cominco and the further 52 joint exhibits filed by the parties that  
25 are authored by Ecology and Environment. Cole dec. ¶5. Since liability will be established by  
26 the documentary evidence, none of which include documents by Ecology and Environment, no  
27  
28

1 testimony that Mr. Horner is described as giving would be relevant, and Adams moves to  
2 preclude the testimony of Greg Horner. (Adams is separately moving to preclude the testimony  
3 of Mr. Horner because of Teck Cominco's failure to disclose his testimony with the requisite  
4 specificity.)

6 **I. The testimony of Kevin Lackey is not relevant.**

7 Teck Cominco discloses that "Mr. Lackey will testify as to issues involving the Teck  
8 Cominco laboratory facilities at Red Dog." Liability Phase Witness List at 5. However, "issues"  
9 involving the lab have no bearing on liability under the strict liability of the Clean Water Act.  
10 *EPIC*, 430 F.Supp.2d at 1010. Thus, no testimony that Mr. Lackey is described as giving would  
11 be relevant, and Adams moves to preclude the testimony of Kevin Lackey. (Adams is separately  
12 moving to preclude the testimony of Mr. Lackey because of Teck Cominco's failure to disclose  
13 his testimony with the requisite specificity.)

16 **J. The testimony of Kent Patton and Mike Prieve is not relevant.**

17 Teck Cominco lists Kent Patton to "testify as to work performed by North Creek  
18 Analytical, Inc." and Mike Prieve to "testify as to laboratory procedures, alleged cyanide  
19 excursions, and work performed by North Creek Analytical." Liability Phase Witness List at 6.  
20 As explained above, the best evidence of any testing done by North Creek Analytical is the test  
21 result itself, and all timely-disclosed North Creek Analytical test results are already admitted  
22 evidence in this matter. "Laboratory procedures" are not relevant to liability once Teck Cominco  
23 has reported a violation in its DMR. *EPIC*, 430 F.Supp.2d at 1010. Thus, no testimony that Mr.  
24 Patton or Mr. Prieve is described as giving would be relevant, and Adams moves to preclude the  
25 testimony of Kent Patton and Mike Prieve.

1           **K.       The testimony of David Pillard is not relevant.**

2           Teck Cominco discloses that David Pillard will “testify as to WET claims and WET  
3 testing methodology and procedures.” Liability Phase Witness List at 6. Although Mr. Pillard’s  
4 qualifications and affiliation are not disclosed, Teck Cominco’s earlier-filed witness list lists him  
5 as as with ENSR out of Fort Collins, Colorado. Defendant Teck Cominco Alaska Incorporated’s  
6 Final Witness List [Docket 29], at 15. As explained above, the best evidence of any WET testing  
7 done by ENSR is the test result itself, and all timely-disclosed ENSR WET tests are already  
8 admitted evidence in this matter. WET testing “methodologies and procedures” are not relevant  
9 to liability once Teck Cominco has reported a violation in its DMR. Thus, no testimony that Mr.  
10 Pillard is described as giving would be relevant, and Adams moves to preclude the testimony of  
11 David Pillard.  
12  
13  
14

15           **L.       The testimony of Mike Stanoway is not relevant.**

16           Teck Cominco discloses that “A CH2M Hill employee, Mr. Stanoway will testify as to  
17 biomonitoring, bioassay surveys, and WET.” Liability Phase Witness List at 6. On their face,  
18 biomonitoring and bioassay surveys are not relevant to Teck Cominco’s permit violations or their  
19 ongoing nature. Further, any CH2M Hill WET tests to be used as evidence speak for themselves;  
20 all timely-disclosed WET tests are already admitted as evidence in this matter. Cole dec. ¶7.  
21 Thus, no testimony that Mr. Stanoway is described as giving would be relevant, and Adams  
22 moves to preclude the testimony of Mike Stanoway. (Adams is separately moving to preclude  
23 the testimony of Mr. Stanoway because of Teck Cominco’s failure to disclose his testimony with  
24 the requisite specificity.)  
25  
26  
27

28           **M.       The testimony of William Stubblefield is not relevant.**



1 Teck Cominco discloses that “Dr. Stubblefield will testify as to WET.” Liability Phase  
 2 Witness List at 7. This is the only identification given of the testimony and Dr. Stubblefield.  
 3 Consulting Teck Cominco’s earlier-filed witness list, Dr. Stubblefield is listed as with Parametrix  
 4 of Corvallis, Oregon. Defendant Teck Cominco Alaska Incorporated’s Final Witness List  
 5 of Corvallis, Oregon. Defendant Teck Cominco Alaska Incorporated’s Final Witness List  
 6 [Docket 29], at 18. As explained above, the best evidence of any testing done by Parametrix is  
 7 the test result itself, and all timely-disclosed Parametrix tests are already admitted evidence in  
 8 this matter. Thus, no testimony that Dr. Stubblefield is described as giving would be relevant,  
 9 and Adams moves to preclude the testimony of William Stubblefield. (Adams is separately  
 10 moving to preclude the testimony of Mr. Stubblefield because of Teck Cominco’s failure to  
 11 disclose his testimony with the requisite specificity.)  
 12

13  
 14 **N. The testimony of Jason Weakley is not relevant.**

15 Teck Cominco offers Mr. Weakley to “testify as to the chemistry and treatment of Red  
 16 Dog water.” Liability Phase Witness List at 7. The “chemistry and treatment of Red Dog water”  
 17 do not appear to be relevant to Teck Cominco’s permit violations and their ongoing nature, and  
 18 thus Adams moves to preclude the testimony of Mr. Weakley. (Adams is separately moving to  
 19 preclude the testimony of Mr. Weakley because of Teck Cominco’s failure to disclose his  
 20 testimony with the requisite specificity.)  
 21

22 **VII. THE PROFFERED TESTIMONY OF US EPA OFFICIALS IS NOT RELEVANT**  
 23 **TO LIABILITY.**

24 Teck Cominco also offers two EPA officials – Eva Chun and Keith Cohon – on the  
 25 witness list. However, their testimony as described by Teck Cominco in the witness list does not  
 26 affect Teck Cominco’s liability or illuminate the ongoing nature of the violations alleged in this  
 27 suit, and thus Adams respectfully objects to the testimony of and moves in limine to preclude the  
 28

1 listed witnesses Eva Chun and Keith Cohon from testifying at the liability phase at trial.

2 **A. The testimony of Eva Chun is not relevant.**

3 Teck Cominco lists Eva Chun of the Water Division at Region 10 of EPA as a witness,  
4 explaining,

6 She is expected to testify regarding the regulatory action she took or participated in taking  
7 in relation to the regulation of Red Dog Mine's water discharge and management. Her  
8 testimony is expected to include information about the mine's operation and impacts that  
9 she gathered and/or considered relating to, in particular, to the compliance orders by  
10 consent (COBC) EPA gave to the mine and which she was involved. Her testimony may  
also include the regulatory standards she believes are appropriate and present for the  
Mine's water discharge.

11 Liability Phase Witness List at 3-4. Because liability hinges on what Teck Cominco reported in  
12 its DMRs and what its permit requires, any "regulatory action she took or participated in taking  
13 in relation to the regulation of Red Dog Mine's water discharge and management" is not relevant,  
14 nor is "information about the mine's operation and impacts that she gathered and/or considered  
15 relating to, in particular, to the compliance orders by consent (COBC) EPA gave to the mine and  
16 which she was involved." The COBCs on their face acknowledge that Teck Cominco is  
17 violating its permit after the filing of this suit – *see, e.g.*, Trial Exhibit 1002 (Exhibit 2 to Cole  
18 dec.) ("At times during the months of... May-June 2004, and May-June 2005, Teck Cominco  
19 violated the TDS effluent limits in Part I.A.1 of the 1998 Permit" (¶12)) – and thus information  
20 "gathered and/or considered" by Ms. Chun is not relevant to liability here. Finally, the  
21 evaluation of what the Clean Water Act and Teck Cominco's permit require is within the ambit  
22 of this Court, not some random EPA employee chosen by Teck Cominco. Her testimony as to  
23 "the regulatory standards she believes are appropriate and present for the Mine's water  
24 discharge" is simply not relevant; on its face, she did not sign the COBC. Exhibit 2 to Cole dec.

1 Thus, no testimony that Ms. Chun is described as giving would be relevant, and Adams moves to  
 2 preclude the testimony of Eva Chun.

3  
 4 **B. The testimony of Keith Cohon is not relevant.**

5 Like Ms. Chun, Mr. Cohon is listed by Teck Cominco with the following description:

6 He is expected to testify regarding the regulatory action he took or participated in taking  
 7 in relation to the regulation of Red Dog Mine's water discharge and management. His  
 8 testimony is expected to include information about the mine's operation and impacts that  
 9 he gathered and/or considered relating to the permits issued to the mine and the COBC's  
 10 given to the mine since the late 1990's. His testimony may also include the regulatory  
 11 standards he believes are appropriate and present for the Mine's water discharge.

12 Liability Phase Witness List at 4. Again, like Ms. Chun's testimony, because liability hinges on  
 13 what Teck Cominco reported in its DMRs and what its permit requires, any "regulatory action he  
 14 took or participated in taking in relation to the regulation of Red Dog Mine's water discharge and  
 15 management" is not relevant. Any "information about the mine's operation and impacts that he  
 16 gathered and/or considered relating to the permits issued to the mine and the COBC's given to  
 17 the mine since the late 1990's" is not relevant here, either, where the permits and the COBCs are  
 18 in evidence, can be reviewed by the Court, and speak for themselves. The COBCs on their face  
 19 acknowledge that Teck Cominco is violating its permit – as noted directly above, *see, e.g.*,  
 20 Exhibits 2 to Cole dec., ¶¶ 12, 14 – and thus information "gathered and/or considered" by Mr.  
 21 Cohon is not relevant to liability here. Finally, the evaluation of what the Clean Water Act and  
 22 Teck Cominco's permit require is within the ambit of this Court, not some random EPA  
 23 employee chosen by Teck Cominco for his flattering testimony. His testimony as to "the  
 24 regulatory standards he believes are appropriate and present for the Mine's water discharge" is  
 25 simply not relevant; on its face, he did not sign the COBC. Exhibit 2 to Cole dec. Thus, no  
 26 testimony that Mr. Cohon is described as giving would be relevant, and Adams moves to  
 27  
 28

1 preclude the testimony of Keith Cohon.

2 **VIII. THE COURT SHOULD LIMIT THE TESTIMONY OF SOME WITNESSES TO**  
 3 **ISSUES RELEVANT TO LIABILITY.**

4 As set forth above in Sections I, II, V and VI and the cases cited therein, this is a strict  
 5 liability case and Teck Cominco may not “explain” or impeach its DMRs. Any testimony or  
 6 “explanation” is simply irrelevant under the Clean Water Act at the liability phase of trial. Thus  
 7 Adams respectfully objects to the testimony of and moves in limine to preclude the following  
 8 listed witnesses from testifying about non-relevant subjects at the liability phase at trial. *Some* of  
 9 the testimony described by Teck Cominco as to be offered by these witnesses may be relevant at  
 10 trial, but as explained below, portions of the testimony as described by Teck Cominco are clearly  
 11 not relevant to liability. Adams requests an Order from this Court limiting the testimony of these  
 12 witnesses: Mark Thompson, Kevin Brix, Mike Botz, Jeffrey Clark, Gary Coulter, Anna Echter,  
 13 Gretchen Miller, Kathleen Willman and James Kulas.

14 **A. Portions of the proffered testimony of Mark Thompson are not relevant.**

15 Teck Cominco offers the testimony of Mark Thompson on, among other topics, “issues  
 16 pertaining to maintenance of the water balance at Red Dog, policies and procedures employed  
 17 within his department, the history of waste water permitting, and efforts to comply with existing  
 18 and past permits and to obtain workable permit[.]” Liability Phase Witness List at 2. None of  
 19 these proffered topics is relevant in establishing or contesting Teck Cominco’s liability. The  
 20 “maintenance of the water balance at Red Dog” is not relevant to liability. The “policies and  
 21 procedures employed within his department” have no bearing on liability, which is established  
 22 from Teck Cominco’s own DMRs and other admissions. The “history of waste water  
 23 permitting,” while perhaps educational, likewise has no relevance to liability. Nor, under the  
 24  
 25  
 26  
 27  
 28

1 strict liability scheme of the Clean Water Act, do Teck Cominco's "efforts to comply with  
 2 existing and past permits." Such "efforts" or intent to comply has no relevance under a strict  
 3 liability statute. Finally, Teck Cominco's efforts "to obtain [a] workable permit" are not relevant  
 4 to questions of liability (although they might, arguably, be relevant to the issue of penalties).  
 5 Accordingly, Adams moves to preclude Mr. Thompson from testifying at the liability phase  
 6 about "issues pertaining to maintenance of the water balance at Red Dog, policies and procedures  
 7 employed within his department, the history of waste water permitting, and efforts to comply  
 8 with existing and past permits and to obtain workable permit[.]"

11 **B. Portions of the proffered testimony of Kevin Brix are not relevant.**

12 Teck Cominco offers the testimony of Kevin Brix on, among other topics, "water quality  
 13 assessments for the protection of aquatic life," and "toxicological [*sic*] issues pertaining to  
 14 effluent." Liability Phase Witness List at 3.<sup>2</sup> Since the questions to be resolved at the liability  
 15 phase include only whether or not Teck Cominco violated its permits (as demonstrated by its  
 16 own self-reporting to EPA) and whether or not those violations are ongoing or capable of  
 17 repetition, neither "water quality assessments for the protection of aquatic life" nor "toxicological  
 18 issues pertaining to effluent" are relevant, and Adams thus moves to preclude Mr. Brix from  
 19 testifying at the liability phase about either issue.

22 **C. Portions of the proffered testimony of Mike Botz are not relevant.**

23 Teck Cominco offers the testimony of Mike Botz on cyanide "consistent with his  
 24 declarations on file in this case and KRPC v. Teck Cominco." Those declarations focused  
 25

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27 <sup>2</sup>Mr. Brix is offered as witnesses number 6 and 10. Liability Phase Witness List at 3.  
 28 This objection pertains to both listings.

1 primarily on attacking the validity of the Total Cyanide permit limitation found in Teck  
 2 Cominco's permits, and opining that the WAD cyanide test method is superior. As this is a strict  
 3 liability standard, any explanation of permit violations is both unnecessary and irrelevant.  
 4 Further, as the liability phase involves only violations of the Total Cyanide permit limitations,  
 5 any testimony as to WAD cyanide test methods is not relevant. Further, because Teck Cominco  
 6 did not appeal its Total Cyanide permit limitation, it is precluded from attacking it in this  
 7 litigation. 33 U.S.C. §1369(b)(2). Thus, any testimony by Mr. Botz as to the purported invalidity  
 8 or inferiority of the Total Cyanide test method is irrelevant. Adams thus moves to preclude Mr.  
 9 Botz from testifying about cyanide at all; if Mr. Botz is allowed to testify, Adams moves to  
 10 preclude him from 1) discussing the WAD cyanide method, and 2) criticizing the Total Cyanide  
 11 method.  
 12  
 13  
 14

15 **D. Portions of the proffered testimony of Jeffrey Clark and Gary Coulter are**  
 16 **not relevant.**

17 Teck Cominco offers Mr. Clark and Mr. Coulter for, among other testimony, "all aspects  
 18 of the company's environmental management system, mineralization, and water balance issues."  
 19 Liability Phase Witness List at 4.<sup>3</sup> None of these three topics – environmental management,  
 20 mineralization, or water balance – are at issue at the liability phase of this trial, and are thus not  
 21 relevant. Adams thus moves to preclude Mr. Clark and Mr. Coulter from testifying at the  
 22 liability phase about these issues.  
 23

24 **E. Portions of the proffered testimony of Anna Echter and Gretchen Mitchell**  
 25 **are not relevant.**  
 26

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27 <sup>3</sup>Mr. Clark is offered as witnesses number 15 and 17. Liability Phase Witness List at 4.  
 28 This objection pertains to both listings.

1 Teck Cominco discloses that Ms. Echter and Ms. Mitchell “Will testify as to conductivity  
2 based claims, WET testing and alleged WET excursions.” Liability Phase Witness List at 5.  
3 None of the claims Adams will prove at trial – the end-of-pipe limitations on TDS, cyanide and  
4 WET – involve conductivity testing. Further, the results of the WET tests are already admitted  
5 into evidence in the uncontested DMRs and lab reports, and are the best evidence as to that WET  
6 testing. Thus, the testimony that Ms. Echter or Ms. Mitchell is described as giving “as to  
7 conductivity based claims” and WET testing would not be relevant, and Adams moves to  
8 preclude the testimony of Anna Echter and Gretchen Mitchell on these topics at the liability  
9 phase.  
10  
11

12 **F. Portions of the proffered testimony of Kathleen Willman are not relevant.**

13 Teck Cominco offers the testimony of Kathleen Willman “as to water balance issues and  
14 facts involving specific DMR’s she prepared.” Liability Phase Witness List at 7. While Adams  
15 reserves the right to challenge the relevance of Ms. Willman’s testimony as to any “specific  
16 DMRs she prepared” at trial, any testimony as to “water balance issues” is clearly not relevant to  
17 liability and thus Adams moves to preclude Ms. Willman from testifying at the liability phase  
18 about it. (Adams is separately moving to preclude the testimony of Ms. Willman because of  
19 Teck Cominco’s failure to disclose her testimony with the requisite specificity.)  
20  
21

22 **G. Portions of the proffered testimony of James Kulas are not relevant.**

23 Teck Cominco offers the testimony of James Kulas on, among other topics, “issues  
24 pertaining to maintenance of the water balance at Red Dog, policies and procedures employed  
25 within his department, the history of waste water permitting, and efforts to comply with existing  
26 and past permits and to obtain workable permits.” Liability Phase Witness List at 7. None of  
27  
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1 these proffered topics is relevant in establishing or contesting Teck Cominco's liability. The  
 2 "maintenance of the water balance at Red Dog" is not relevant to liability. The "policies and  
 3 procedures employed within his department" have no bearing on liability, which is established  
 4 from Teck Cominco's own DMRs and other admissions. The "history of waste water  
 5 permitting," while perhaps educational, likewise has no relevance to liability. Nor, under the  
 6 strict liability scheme of the Clean Water Act, do Teck Cominco's "efforts to comply with  
 7 existing and past permits." Such "efforts" or intent to comply has no relevance under a strict  
 8 liability statute. *EPIC*, 430 F.Supp.2d at 1010. Finally, Teck Cominco's efforts "to obtain  
 9 workable permits" are not relevant to questions of liability (although they might, arguably, be  
 10 relevant to the issue of penalties). Accordingly, Adams moves to preclude Mr. Kulas from  
 11 testifying at the liability phase about "issues pertaining to maintenance of the water balance at  
 12 Red Dog, policies and procedures employed within his department, the history of waste water  
 13 permitting, and efforts to comply with existing and past permits and to obtain workable permits."

## 14 IX. CONCLUSION

15 For the reasons set forth above, this Court should dramatically limit the number of  
 16 witnesses Teck Cominco is allowed to present at the liability phase, and strictly limit those  
 17 witnesses testimony to subjects relevant to liability.

18 Respectfully submitted this 29th day of January, 2008.

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23  
24 /S/ Luke Cole

25 Luke Cole  
26 Attorney for Plaintiffs  
27  
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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of January 2008, a true and correct copy of the foregoing Plaintiffs' Objections to Witness List and Motions to Exclude Witnesses was served, via electronic mail, on the below identified parties of record:

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